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№. 98-1983

In The
Supreme Court of The United States
October Term 1998

VINCENT GIGANTE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Second Circuit

REPLY TO THE BRIEF IN OPPOSITION

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Petitioner's Reply to the Brief in Opposition

1. The Government argues that it was proper for the Court of Appeals to effectively ignore this Court's controlling decisions in *Coy v. Iowa*, 487 U.S. 1021 (1988) and *Maryland v. Craig*, 497 U.S. 836 (1990), merely because in this case the absent witness's testimony was televised at trial through the use of two-way closed-circuit television instead of one-way closed circuit television. Br. in Opp. 7-9. This argument is baseless. It flies in the face of the pertinent fact that in *Craig*, this Court specifically noted that a number of jurisdictions were then using two-way, closed-circuit television to present the testimony of victimized children (497 U.S. 854, n.4). Yet, there was nothing stated in *Craig* to suggest that the two-prong constitutional test established in that case, which had to be satisfied before live, face-to-face confrontation could be dispensed with, might be otherwise in those jurisdictions already utilizing the two-way television hookup.

The Court of Appeals and the Government, we submit, misunderstand the true import of this Court's holdings in *Coy* and *Craig*, where this Court paid homage to the recognition that live, face-to-face confrontation has always been, for good reason, an important component of our criminal justice system, and the criminal justice systems of the earlier societies from which the American criminal justice system drew its foundational principles. We believe that this Court in *Coy* and *Craig* unequivocally asserted that the truth-

finding process that takes place, sometimes tempestuously, in the living crucible of the trial court room normally depends upon that very special dynamic which results only from live, face-to-face confrontation. Because of that, only in the narrowest of circumstances, and only after the two-prong test announced in *Craig* has been satisfied, may a defendant be denied that usual constitutional right of live, face-to-face confrontation.

To debate whether the testifying witness in this case could or could not see petitioner's face on the small television monitor at the secret location from which he was testifying simply misses the point. Common sense tells us that it is a lot easier to lie when looking at a television screen than when confronting a defendant, face-to-face, in court:

> " . . . there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' [Citation omitted] What was true of old is no less true in modern times.

Coy v. Iowa, 487 U.S. at 1016.

When the Court made this cogent observation in *Coy*, we do not believe that it was talking about two-way television hookups.[1] Certiorari should be granted in this case to make

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[1]Indeed, the two-way television hookup in this case did not approximate live, face-to-face confrontation because of technical difficulties. As the television monitors were first being set up and

that principle clear.

2. The Government argues that the television procedures used in this case provided petitioner with greater benefits than would have a deposition conducted under Fed.R.Crim.P. Rule 15. Br. in Opp. 10-11. Insofar as the Confrontation Clause is concerned, that is not so. A Rule 15 deposition specifically provides for the presence of the criminal defendant at the deposition, even if he is incarcerated, so that the constitutional right to confrontation may be honored. Fed.R.Crim.P. Rule, 15(b). In the present case, petitioner's frail physical health would have prevented him from traveling half way across the country to the secret site from which the witness, who was under the jurisdiction of the Federal Witness Protection Program, would be testifying. More importantly, however, any suggestion by the Government that a Rule 15 deposition might have otherwise been a viable alternative is illusory, for the trial court made it

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tested in the trial court room, it was noted that the spoken words of the persons on the television screen were not syncopated with their lip movements, which defense counsel likened to the delay one sees when watching astronauts who are being televised live from space (T. 2788). When the court inquired why there was an apparent transmission delay, one of the technicians explained that ordinarily, the regular television picture is transmitted at 30 frames per second, but that this particular closed-circuit TV system transmitted at only 15 frames per second (T. 2789). The trial court observed that transmission problems continued while the witness was testifying (T. 3041).

very clear that it would not allow petitioner or his counsel to learn of the geographical area where the witness was then living, which would have been a "dangerous" breach of the Government's witness security program. *See* Pet. Apdx. B 31-32. For that reason, a Rule 15 deposition was never a real possibility.

From the outset, the trial court in this case made it clear that it thought that two-way, closed-circuit television was the only proper way by which to present the absent witness's testimony to the trial jury, without regard to constitutional analysis set forth in *Coy* and *Craig*. We respectfully submit that certiorari should be granted so that it may be established with some greater degree of certainty that the Confrontation Clause is not so fragile a reed that it is completely and easily flattened by the quickly blowing winds of technological advancement.

3. The Government suggests that the petitioner may have waived his confrontation rights. Br. in Opp. 13-14. That is nonsense. At every step of the proceedings below, petitioner's counsel objected to the use of two-way television, fully preserving his constitutional objections. The Court of Appeals "noted," but did not accept the Government's waiver argument. There is no basis for denying petitioner a hearing before this Court on the grounds of such unprecedented, speculative waiver arguments.

Conclusion

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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